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No. 411

In the Supreme Court of the United States

October Term, 1945.

THE UNITED STATES OF AMERICA

vs.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of RESPONDENT.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1945.

No. 411

THE UNITED STATES OF AMERICA

vs.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF *of* RESPONDENT.

Statement of Case.

Peter Micco died intestate, May 20, 1942. On that day Howard Cummings filed his petition in the County Court of Okfuskee County, Oklahoma, praying that L. F. Merrell be appointed administrator of the estate of Micco, deceased. On June 4, 1942, the County Court of Okfuskee County, Oklahoma, entered its order appointing L. F. Merrell, E. F. O'Neal, and Perry Chisholm co-administrators of the estate of Micco, deceased.

On June 4, 1942, M. S. Robertson, United States Probate Attorney, pursuant to the provisions of the Act of Congress of April 12, 1926, (44 Stat. 239) caused written notice of the pendency of such probate proceeding to be served upon the Superintendent of the Five Civilized Tribes.

On June 19, 1942, the United States filed its petition for an order of removal under the Act of April 12, 1926. In its petition, the United States alleged that the proceeding

was instituted to obtain the appointment of an administrator for the estate of Micco, deceased, a three-fourths blood Seminole Indian; that a portion of such estate, comprising real and personal property, is restricted under the laws of the United States; that the title to and an interest in restricted land, and the proceeds, rents, income, and profits derived therefrom are involved; that the heirs-at-law of Micco, deceased, are restricted Indians and wards of the United States; and that notice of the pendency of the probate proceeding was served upon the Superintendent of the Five Civilized Tribes, together with a certified copy of all pleadings on file in such cause, on June 4, 1942. An order of removal was issued on July 2, 1942. A transcript of the proceedings was filed in the United States District Court for the Eastern District of Oklahoma, on July 27, 1942.

On August 10, 1942, the three administrators filed their motion to remand the proceedings to the County Court of Okfuskee County, Oklahoma. By agreement of parties this motion was held in abeyance, by the court, until the conflict of jurisdiction between the Okfuskee County Court and the Tulsa County Court was determined. See *Merrell* v. *United States*, 140 F. (2d) 602.

On July 17, 1944, the United States filed its complaint in intervention in which it alleged that Micco, deceased, was duly enrolled as a three-fourths blood Seminole Indian opposite Roll No. 1600 of the approved Seminole Rolls, and, as such, was allotted land in the Seminole Nation, for which patents were duly executed, delivered, and recorded; that Micco, deceased, was a full-blood Indian, being one-fourth Creek and three-fourths Seminole; that the restricted land of Micco, deceased, produced large sums of money, which were held under the supervision of the Secretary of the Interior, pursuant to the regulations prescribed by him; and that Micco died intestate on May 26, 1942, possessed of such restricted lands and funds.

It further alleged:

That no court has legally determined the fact of heirship, and that therefore intervener, is entitled to the judgment and decree of this court determining who are, or were, the heirs of Peter Micco, deceased, and excluding all unknown persons claiming to be heirs of Peter Micco.

> "That on or about November 25, 1942, the said Haney Micco Larney, died, leaving surviving her husband, Ryder Larney, and her minor children, June Larney, Hattie Larney, and Johnnie Lee Larney, all unenrolled Seminole Indians; that the said Haney Micco Larney devised and bequeathed all of her estate in equal parts in said survivors by will, which was executed and approved in all particulars required by law, and has been admitted to probate by the county court having jurisdiction of the settlement of her estate, that subsequent to the death of the said Haney Micco Larney, the said Johnnie Lee Larney died intestate without ever having been married, leaving surviving, his father Ryder Larney, and his two sisters, June Larney and Hattie Larney, heerinabove named; that no decree of heirship has ever been entered by any court to determine the heirs of the said Johnnie Lee Larney, deceased; that in order to determine who are now entitled to receive the estate of Peter Micco, it is necessary and proper that the judgment of this court shall determine whether or not the will of the said Haney Micco Larney transferred her interest to the said devisees and legatees hereinabove named, and, if not, to determine who are her heirs, and also who are the heirs of the said Johnnie Lee Larney, and for such purposes it is proper to proceed against all unknown persons claiming to be heirs of Johnnie Lee Larney, deceased."

It prayed that the court determine the heirs of Micco, deceased, the nature of the property of which Micco died seized, whether restricted or unrestricted, and the specific parts thereof which are restricted and subject to the supervision of the Secretary of the Interior.

On March 6, 1945, the United States District Court for the Eastern District of Oklahoma entered an order dismissing the petition in intervention without prejudice, and ordering that the proceeding be remanded to the County Court of Okfuskee County, Oklahoma.

On April 28, 1945, the United States filed in the Circuit Court of Appeals of the Tenth Circuit its application for leave to file a petition for a writ of mandamus and attached thereto a copy of its proposed petition. The petition prays that a writ of mandamus issue out of that court directed to the Judge of the United States District Court for the Eastern District of Oklahoma commanding him to vacate the judgment entered March 6, 1945, dismissing the complaint in intervention and ordering the proceeding remanded to the County Court of Okfuskee County, Oklahoma.

At the hearing on the application for leave to file the petition for the writ this court sat en banc.

The judges of that court were equally divided on the question of whether the judgment of remand was reviewable by mandamus and on the question of whether the proceeding was removable under the provisions of the Act of April 12, 1926. The case was certified to this court, for it decision, pursuant to 28 U. S. C. 346, by the Circuit Court.

Specification of Points.

1. The judgment of the Federal District Court of the Eastern District of Oklahoma remanding the cause to the County Court of Okfuskee County, Oklahoma, is not reviewable by mandamus.

2. The probate proceedings filed in the County Court of Okfuskee County, Oklahoma, was not removable to the Federal District Court under the provisions of the Act of April 12, 1926.

ARGUMENT.

The Government has another adequate remedy at law, therefore, the judgment of remand is not reviewable by mandamus.

When this case was presented to the Federal District Court for the Eastern District of Oklahoma the Government contended that in this removed action the Federal District Court acquired jurisdiction to decree the heirs of Peter Micco, deceased, determine what property was restricted and what property was unrestricted, and to administer upon the unrestricted property, performing the same functions as the probate court.

In the Circuit Court the Government abandoned its demands that the Federal Court administer upon the estate of said deceased and only the other questions involved were presented. It will be noted that the only questions the Government is now seeking to have decided, in the removed case, are the questions of fact as to who are the heirs of Peter Micco, deceased, and of Johnnie Lee Larney, deceased, and to determine what property passed under the will of Haney Micco Larney, deceased, and to determine their restricted property. As was suggested by Judge RICE, in his opinion, if the Government does not care to litigate these questions in the State Court the Federal District Court is available to it in an original action filed therein for that purpose.

The general rule is that mandamus does not issue where there is another adequate remedy. *Calf Leather Tanner Company* v. *Morganthau*, 80 F. (2d) 536, cert. den. 297 U. S. 715; *Searl* v. *Robertson*, 18 F. (2d) 829, cert. den. 275 U. S. 532; *United States, ex rel. Frey*, v. *Robertson*, 63 F. (2d) 457, cert. den. 298 U. S. 741.

For the general rule of the availability of another remedy, we quote from 34 Amer. Juris. 835:

> "Invented, as it was, for the purpose of supplying defects in justice, mandamus does not supersede legal remedies. To warrant the court in issuing the writ, it must appear that the complaining party has a clear legal right to the performance of the particular duty sought to be enforced and that he has no other plain, adequate, and complete method of redressing the wrong or of obtaining the relief to which he is entitled, so that without the aid of the writ, there would be a failure of justice. According to the practice in most jurisdictions, the writ of mandamus does not issue if any other remedy exists which is fully adequate."

The Act of June 14, 1918, making the County Court of Oklahoma a federal agent for the purpose of determining the question of fact as to who are the heirs of a deceased citizen of the Five Civilized Tribes of Indians, contained the following provision:

> "Provided that an appeal may be taken in the manner and to the court provided by law in cases of appeals in probate matters generally."

Evidently Congress had in mind that in cases where restricted Indians were involved they would be represented by the United States Probate Attorney, or other representatives, and that they would have a right by successive appeals to have the judgment reviewed by the Supreme Court of the United States. In the case of *United States v. Fixico*, 115 F. (2d) 389, in an opinion written by Judge BRATTON, page 393, the court used the following language:

> "• • • The United States expresses concern that if the orders are not re-examined and vacated, it will not have any opportunity to be heard in the litigation in its capacity as guardian of these Indian wards, and that it will be bound by the judgments of the state courts. We entertain no doubt that the United States

can now appear in the state courts, appropriately litigate all issues and by the process of successive appeals, present the federal questions involved to the Supreme Court of the United States."

It is no longer an open question that this method of review is available to the Government.

In addition to the above remedy, the Government may file a suit in the Federal District Court of the Eastern District of Oklahoma to quiet title and decree heirs and determine the restricted property. Judge RICE calls attention to this procedure in his opinion in the *Micco* case. For a review of these authorities, see the case of *McCarty* v. *Hollis*, 120 F. (2d) 540. We quote from the opinion:

"The United States, in its own behalf and in its capacity as guardian of Indian tribes or individual Indians, may institute and maintain in the federal courts appropriate suits for the enforcement of the rights or the protection of the property of its Indian wards. *Heckman* v. *United States*, 224 U. S. 413, 32 S. Ct. 424, 56 L. ed. 820; *United States* v. *Noble*, 237 U. S. 74, 35 S. Ct. 532, 59 L. ed. 844; *United States* v. *Osage County*, 251 U. S. 128, 40 S. Ct. 100, 64 L. ed. 184; *La Motte* v. *United States*, 254 U. S. 570, 41 S. Ct. 204, 65 L. ed. 410; *Creamer* v. *United States*, 261 U. S. 219, 43 S. Ct. 342, 67 L. ed. 622; *United States* v. *Minnesota*, 270 U. S. 181, 46 S. Ct. 298, 70 L. ed. 539; *Mars* v. *McDougal*, 10 Cir., 40 F. (2d) 247, certiorari denied 282 U. S. 850, 51 S. Ct. 28, 75 L. ed. 753; *Tiger* v. *Twin State Oil Co.*, 10 Cir., 48 F. (2d) 509. The right to maintain such suits is the necessary complement to the obligations of guardianship which the United States bears towards its wards. *Heckman* v. *United States*, *supra*; *La Motte* v. *United States*, *supra*. The jurisdiction of a United States Court to entertain such a suit finds its source in Section 2 of Article III of the Constitution of the United States which provides that the judicial power of the United States shall extend to all controversies to which the United States is a party. *Barnett* v. *United States*, 9

Cir., 82 F. (2d) 765, certiorari denied 299 U. S. 546, 57 S. Ct. 9, 81 L. ed 402."

Nor will the fact that there is an administration pending in the County Court of Okfuskee County, Oklahoma, prevent the Government from filing an original action in the Federal District Court of the Eastern District of Oklahoma for the same relief sought in its petition of intervention filed in the removed case. See *McDougal, et al.*, v. *Black Panther Oil & Gas Company, et al.*, 273 Fed. 113; *Marsh* v. *Peters, supra; Wells* v. *Helms, et al.*, 105 F. (2d) 402; *Roberts* v. *Anderson, et al.*, 66 F. (2d) 874; *United States* v. *Anglin & Stevenson, et al.*, 145 F. (2d) 622.

An appeal or writ of error does not lie to review an order of remand, for the reason that such an order is not a final judgment or decree.

This same question was presented to the Circuit Court of Appeals in the case of *United States* v. *Fixico, et al.*, 115 F. (2d) 389. That case was originally filed in the State District Court and removed to the Federal District Court of the Eastern District of Oklahoma, under the act of April 12, 1926. Thereafter, the plaintiff filed a motion to remand the case to the State District Court which motion was by the Federal District Judge sustained and the government appealed to the Circuit Court of Appeals, and at the same time filed an application for writ of mandamus to compel the Federal District Court to recall its order of remand, and retain jurisdiction of the case.

In an opinion by Judge BRATTON, the Circuit Court denied the writ and dismissed the appeal. Because of the similarity of the questions involved, and the numerous authorities cited by the court supporting its conclusions, we quote extensively from the opinion:

"Prior to the enactment of the Judiciary Act of

March 3, 1875, 18 Stat. 470, an appeal or writ of error did not lie to review an order of remand for the reason that such an order was not a final judgment or decree. *Knickenbocker Ins. Co.* v. *Comstock*, 16 Wall. 258, 21 L. ed. 493; *Chicago & A. R. Co.* v. *Wiswall*, 23 Wall. 507, 23 L. ed. 103. But Section 5 of the Act of 1875, *supra*, expressly authorized review of such an order on writ of error or appeal, as the case might be. That provision continued in force only two years. Section 2 of the Act of March 3, 1887, 24 Stat. 552, provided that an order of remand should be immediately carried into execution, and that no appeal or writ of error should be allowed; *and Section 6 expressly repealed that part of Section 5 of the Act of 1875, authorizing review.* As corrected by the Act of August 13, 1888, 25 Stat. 433, and as amended by the Act of March 3, 1911, 36 Stat. 1087, 1094, the provision interdicting the review of an order of remand by appeal or writ of error is a part of Section 28 of the Judicial Code, as amended, 28 U. S. C. A., §71. While the textual language of the statute merely denied review by appeal or writ of error, and does not mention writs of mandamus, it is no longer open to doubt that an order remanding a case which was removed from a state court under the general removal statute cannot be re-examined in this court on appeal, by mandamus, or otherwise. *Morey* v. *Lockhart*, 123 U. S. 56, 8 S. Ct. 65, 31 L. ed. 68; *In re Pennsylvania Co.*, 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; *McLaughlin Bros.* v. *Hollowell*, 228 U. S. 278, 33 S. Ct. 465, 57 L. ed. 835; *Yankaus* v. *Feltenstein*, 244 U. S. 127, 37 S. Ct. 567, 61 L. ed. 1036; *In re Matthew Addy S. S. Co.*, 256 U. S. 417, 41 S. Ct. 508, 65 L. ed. 1027; *Employers Reinsurance Corporation* v. *Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289; *Traveler's Protective Ass'n* v. *Smith*, 4 Cir., 71 F. (2d) 511; *In re Satterley*, 5 Cir., 102 Fed. (2d) 144, *certiorari* denied *Jones* v. *Page*, 308 U. S. 562, 60 S. Ct. 93, 84 L. ed. 472.

"It is urged however that Section 3 is silent in respect to the re-examination of an order of remand; that the inhibition against re-examination contained in the general removal statute has no application; and

that in the absence of a forbidding statute, the orders may be re-examined, either on appeal or by mandamus. In respect to the removal of a case coming within its scope, Section 3 is complete, independent, and distinct from the general removal statute. *McKay* v. *Rogers*, 10 Cir., 82 F. (2d) 795. But it is silent respecting the remand of a case removed under its provisions, or the re-examination of an order of remand. It must be presumed that the Congress, in the enactment of the statute in that manner, was cognizant of the long-established general rule that an order of remand in a case removed under the general removal statute could not be re-examined in any form. And it is the well-recognized rule that a special or isolated enactment of this kind must be read in the light of the existing law relating to the subject. A new statute of a fragmentary nature must be construed as intended to fit harmoniously into the existing system, unless a contrary legislative purpose is plainly indicated. *United States* v. *Barnes*, 222 U. S. 513, 32 S. Ct. 117, 56 L. ed. 291; *United States* v. *Sweet*, 245 U. S. 563, 38 S. Ct. 193, 62 L. ed. 473; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. ed. 748; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. ed. 859; *Gay* v. *Ruff*, 292 U. S. 25, 54 S. Ct. 608, 78 L. ed. 1099, 92 A. L. R. 970. Nothing appears in the language of this statute, in the reports of Congressional Committees, or otherwise, which indicates a legislative intent to depart from the general rule that an order of remand is not subject to review or re-examination, either by appeal or mandamus. And in the absence of such an indication, the statute should be construed to fit harmoniously into the general system on the subject. Compare, *Cole* v. *Garland*, 7 Cir., 107 F. 759. For the reasons indicated, the orders of remand are not open to re-examination in this court on appeal or by mandamus."

In the case of *Mutual Life Insurance Co. of New York* v. *Holly, Judge, et al.*, (C. C. A. 7th) 135 F. (2d) 675, the court in announcing this same rule used the following language in the opinion:

"We think for another reason we have no jurisdiction to issue a writ of mandamus or injunction in this cause. It is admitted by counsel for the insurance company that it is without remedy by way of appeal to this court. That is an admission that this court has no jurisdiction. Our jurisdiction is wholly appellate, and if there is no appeal pending here and can be no appeal, we are wholly without authority to issue a writ of mandamus or injunction, as we have no such original jurisdiction. Our jurisdiction to issue such writs is only incidental to and in aid of our appellate jurisdiction. 28 U. S. C. A., § 377; *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16, 59 L. ed. 129; *United States* v. *Avis*, 3 Cir., 108 F. (2d) 457. Since there is no proceeding of any kind which invokes or may invoke our appellate jurisdiction in aid of which the writs herein prayed for are sought, we are wholly without jurisdiction to issue them."

The same rule was announced in the following cases: *In re Application of the Hardware Mutual Fire Ins. Co.*, (Minn.) 91 F. (2d) 13; *Wabash Ry. Co.* v. *Woodrough, District Judge, et al.*, 29 F. (2d) 832.

In *Moulding-Brownell Corporation* v. *Sullivan*, 92 F. (2d) 646, certiorari denied 303 U. S. 638, in the third paragraph of the syllabus the court announced the following rule:

"In statutes prescribing procedure for removal of cause from state court to Federal District Court and prohibiting review of District Court's decision remanding cause to state court, Congress intended to prohibit review of such decision not only by appeal or writ of error but by mandamus as well, irrespective of whether cause was remanded on jurisdictional or procedural grounds (Jud. Code, Secs. 28, 29, 28 U. S. C. A., Secs. 71, 72)."

In *Employers Reinsurance Corporation* v. *Bryant*, 81 L. ed. 289, this court, speaking through Justice VAN DEVANTER, used the following language:

"A leading case on the subject is *Re Pennsylvania Co.*, 138 U. S. 451, 34 L. ed. 738, 11 S. Ct. 141, which dealt with a petition for mandamus requiring the judges of a Circuit Court, to reinstate, try and adjudicate a suit which they, in the Circuit Court, had remanded to the state court whence it had been removed. After referring to the earlier statutes and practice and coming to the Act of March 3, 1887, this court said (p. 454):

> 'In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal Courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.'

"The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of Secs. 71 and 80, 28 U. S. C. A. They are *in pari materia*, are to be construed accordingly rather than as distinct enactments, and when so construed, show as was held in *Morey* v. *Lockhart*, 123

U. S. 56, 58, 31 L. ed. 68, 69, 8 S. Ct. 65, that they are intended to reach and include all cases removed from a state court into a Federal Court and remanded by the latter."

In *Frank L. Kloeb, Judge*, v. *Armour & Company*, 85 L. ed. 124, this court held that a Federal District Court in determining whether a cause removed to it should be remanded to the state court, under the statute requiring the remand of cases improperly removed to the Federal Court, was not bound by a prior decision of the highest court of the state, in the same cause, holding the cause to be removable to the Federal Court and the order of the Federal Court remanding the cause was not, on that ground, reviewable by the Circuit Court of Appeals on mandamus.

The Government now contends in substance that the ban on review contained in the 1887 Act does not apply to the United States on the principle that the Government is not to be deprived of a prerogative, right, or interest by the general terms of a statute which does not expressly include the United States.

We are familiar with the rule which the Government has in mind, and the cases cited in relation thereto, but we submit that the rule mentioned is without application here, and is only applied where the meaning of a statute is vague or doubtful, which we submit is not the case here.

Title 28, Section 71, the statute in question, is very plain. We quote from what we consider the pertinent part as follows:

"Whenever *any cause* shall be removed from any state court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the

District Court so remanding such cause shall be allowed."

The plain and unequivocal language of this portion of the statute fortified by the long unbroken line of decisions of all the Federal Courts, over a period of sixty years, consistently holding that an order of removal is not reviewable either by appeal or mandamus leaves no room for speculation or doubt as to the purpose for which this statute was enacted.

In the case of *United States* v. *California*, 297 U. S. 175, 80 L. ed. 567, this court held, in paragraph 6 of the syllabus as follows:

> "The presumption that a sovereign is not intended to be bound by its own statute, unless named in it, is an aid to construction when the purpose of the statute is in doubt, but does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated."

We also quote from the opinion of the court delivered by Mr. Justice STONE, reading as follows:

> "Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see *Guaranty Title & T. Co.* v. *Title Guaranty & S. Co.*, 234 U. S. 152, 56 L. ed. 706, 32 S. Ct. 457, 27 Am. Bankr. Rep. 873; *United States* v. *Herron*, 20 Wall. 251, 22 L. ed. 275; *Re Fowble*, (D. C.) 213 F. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. *United States* v. *Herron*, *supra* (20 Wall. 255, 22 L. ed. 276); *Dollar Sav. Bank* v. *United States*, 19 Wall. 227, 239, 22 L. ed. 80, 82. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated."

This case was presented to the District Court and after careful consideration in an able opinion he decided the issues as he understood the law to be. The Government is seeking in this case to compel that court to decide the issues in a different way. This court in the case of *Interstate Commerce Commission* v. *United States*, 289 U. S. 386, 77 L. ed. 1274, in the 8th paragraph of the syllabus announced the following rule:

> "Mandamus will not issue to compel a judicial officer to act in a particular way."

The proceedings instituted in the County Court of Okfuskee County to probate the unrestricted estate of Peter Micco, deceased, was not removable under the provisions of the Act of April 12, 1926.

STATUTES INVOLVED.

Section 1 of the Act of June 14, 1918, 40 Stat. 606:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma, having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided*, that an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally.

Section 3 of the Act of April 12, 1926, 44 Stat. 239:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the state courts of Oklahoma, to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties,

as plaintiff, defendant, or intervener, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved.

Judge RICE in his opinion, because of the importance of the questions involved, reviewed the decisions of both the State and Federal Courts, as well as the history of the Congressional Acts involved herein. His opinion is thorough, exhaustive, and we think clearly sets out the correct rule of law applicable to the questions in the case. For that reason, we incorporate herein as a part of our brief his opinion:

THE OPINION.

MEMORANDUM.

"This proceeding originated in the County Court of Okfuskee County, Oklahoma, by the filing of a petition for the appointment of an administrator of the estate of Peter Micco, deceased. The petition discloses that the deceased left an estate of the approximate value of $500,000.00, and that his heirs are full-blood Indians.

"Removal to this court was upon petition filed by the United States Government, pursuant to a notice caused to be served upon the Superintendent of the Five Civilized Tribes by the United States Probate Attorney, acting in his official capacity, and for alleged incompetent minor heirs of the deceased. The petition for removal filed by the United States discloses that

the deceased was enrolled as the 3/4ths blood Seminole Indian and that a portion of the estate of said deceased is restricted property under the laws of the United States, and that the heirs at law of said Peter Micco are restricted Indians. The basis of the notice caused to be served by the United States Probate Attorney was a motion to dismiss filed in the County Court of Okfuskee County, Oklahoma, challenging the jurisdiction of the County Court to appoint an administrator for two reasons: *First*, Micco was not a resident of Okfuskee County at the time of his death; and *second*, the petitioner was not authorized to file the petition, being neither a relative of the deceased nor a creditor of his estate.[1]

"Before removal here, the County Court appointed co-administrators who filed their bonds and qualified as such. After the decision in *Merrell* v. *United States*, 140 F. (2d) 602, the government abandoned any contest as to the jurisdiction of the County Court to appoint an administrator and filed herein its complaint in intervention, seeking the judgment of this court determining the heirs of the deceased. In addition, the government alleges that since the death of Peter Micco, one of his heirs, Haney Micco Larney, has died leaving a will which has been admitted to probate by the County Court having jurisdiction of the settlement of her estate, and that since the death of Haney Micco Larney, one of her heirs, to-wit, Johnnie Lee Larney, has died intestate. On these allegations the court is asked to determine whether or not the will of said Haney Micco Larney, transferred her interest in the estate of Peter Micco, deceased, to the devisee and legatees named therein, and if not, to determine the heirs of the said Haney Micco Larney and also the heirs of Johnnie Lee Larney, the ulitmate relief sought by the government being a determination of who are now the rightful owners of the property left by Peter Micco, deceased, what

1. For a discussion of the facts in regard to the conflict as to the place of residence of the deceased during his lifetime, and at the time of his death, see Micco, Guardian, v. Huser, 185 Okl. 394, and Merrell v. United States, 140 F. (2d) 602.

interest each takes, and a further decree determining which properties of the deceased are restricted and subject to the supervision of the Secretary of the Interior.

"A probate proceeding—nothing more—was removed. Equitable relief which might appropriately be granted in an original action filed herein by the United States government is now sought. The question is—does this court have jurisdiction to proceed and determine in this removed proceeding the issues presented in the government's complaint in intervention? Stated another way—is a probate proceeding removable under Section 3 of the Act of April 12, 1926 (44 Stat. 239)[2]?

"The jurisdiction of this Court has been challenged by motion to remand filed herein by the administrators appointed by the County Court. For the first time, the government has definitely taken the position that this court has probate jurisdiction in their Indian cases. At the request of this court the government filed its brief herein stating clearly and definitely its position. Its position, as stated in its brief, is:

> '*1.* Whether proceedings for the probate of the estate of a deceased, restricted Indian allottee of the Five Civilized Tribes who is survived by restricted Indian heirs are removable to the Federal Court under Sec. 3 of the Act of April 12, 1926, 44 Stat. 239.
>
> '*2.* Whether, if such proceedings are removable, the Federal Court may exercise complete probate jurisdiction *and fully administer the unrestricted estate.*' (Emphasis supplied.)

"Admittedly, the question presented is not without difficulty. The difficulty is presented by the fact that this jurisdiction is committed to the conclusion that a contest over the probate of a will devising restricted property of a deceased restricted member of the Five Civilized Tribes is removable. *Caesar v. Burgess*, 103 F. (2d) 503. On the other hand, the courts of

2. Hereinafter referred to as the Act of 1926.

this jurisdiction are committed to the conclusion that this court does not have general probate jurisdiction nor are probate proceedings removable under the general removal statutes. *Caesar* v. *Burgess, supra; House* v. *United States*, 144 F. (2d) 555 (a removed case).

"In the *Jackson Barnett* case, *Scott* v. *Beams, et al.*, and four other cases, 122 F. (2d) 777, the right of the government to remove a probate proceedings from the County Court was not discussed. That case was a consolidation of a proceeding removed from the County Court of Muskogee County, Oklahoma, with two quiet title suits, one removed from the State District Court of Muskogee County, and the other removed from the State District Court of McIntosh County, seeking a determination of the heirs of Jackson Barnett. After removal, the probate proceeding was consolidated with the two quiet title suits. Thereafter, Judge WILLIAMS entered an order retaining jurisdiction in the probate proceedings for the sole purpose of determining heirs, and remanded such proceedings for the appointment of an administrator and further proceedings by the administrator. The procedure followed by Judge WILLIAMS in the *Jackson Barnett* case was the same as he had followed in *Caesar* v. *Burgess, supra*, wherein he retained jurisdiction solely for the purpose of determining the contest of the will, and in an earlier case of *In re Palmer's Will*, 11 F. Supp. 301. It is interesting to note that the *Palmer's Will* case, the first of its kind to be removed, was not removed until after trial in the County Court and while pending on appeal in the District Court. The government has recently taken the position in this court, that an attempted removal after appeal is ineffective, and this court does not acquire jurisdiction.

"After the decision in *Scott* v. *Beams*, came the decision of the Supreme Court of the United States in *United States* v. *Hellard*, 322 U. S. 363, which will be discussed later on in this memorandum.

"If this court has the jurisdiction contended for by the Government, it is by virtue of Section 3 of the

Act of 1926. Said section refers to 'parties to a suit' as 'plaintiff, defendant, or intervener.' It provides that the United States 'may appear in said cause within twenty days 'after service of notice.' Twenty days is the time provided by the laws of Oklahoma for a defendant in a civil suit in the District Courts to answer. The history of this legislation shows that an effort was made to change the time within which the Government should appear from twenty days to sixty days. Objection was made to this change for the reason that it was not deemed wise to attempt to change the procedure of the State Courts of Oklahoma. Obviously, the members of Congress were not thinking of the probate procedure of the County Courts of Oklahoma. See Congressional Record, Vol. 67, part 6, pages 6517 and 6573. In order to conform to state procedure and still have additional time, it was provided that 'the trial court' (meaning state court) may extend the time within which the United States may appear. When such a suit is removed, the act provides: 'and the cause shall then proceed in the same manner as if it had been originally commenced in said District Court.'

"A careful reading of Section 3, accepting the language as the terms therein are ordinarily understood, does not suggest a probate proceeding. Conceding, for the moment, that the term 'suit' as used in the act, in its broadest interpretation and meaining, includes a probate proceeding, the fact remains that such is not its ordinary and accepted meaning, and we should presume Congress used it in its ordinary and accepted meaning. If Section 3 is to be construed as the government contends for, it confers upon the United States District Courts of the eastern half of Oklahoma jurisdiction in a vast field of law and a jurisdiction which does not exist by the general act of Congress. One would presume that had Congress intended to make such a sweeping change in the jurisdiction of the United States District Courts of this jurisdiction, apt language to that effect would have been used, leaving the matter free from doubt. If it had been the purpose of Congress to thus enlarge the jurisdiction of

the courts in so far as restricted members of the Five Civilized Tribes are concerned, it is difficult to understand why the Department of the Interior, immediately upon the passage of the act, and the Department of Justice did not so understand it. The intent of Congress should have been better known then than it is now, nineteen years after the passage of the act.

"The Act of 1926 was passed for the purpose of affording relief in so far as the permanence of Indian titles in the eastern part of Oklahoma is concerned. It has been said 'such act is a remedial statute for permanence of titles, and that judgments in all such actions should be binding on all parties.' *United States* v. *Thompson*, 128 F. (2d) 172.

"In *Board of County Commissioners of Tulsa County* v. *United States*, 94 F. (2d) 450, Section 2 of the act was under consideration. Therein Judge BRATTON, speaking for the court, stated:

> 'The suit above described must be one claiming "title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, rents and profits derived from the same".'

"The decision in *Caesar* v. *Burgess*, *supra*, was based upon the proposition that title to real estate was involved. Therein, Judge BRATTON, said:

> 'The Supreme Court of the State (Oklahoma) has held repeatedly that a contested proceeding for the probate of a will is a special proceeding in the nature of an equitable action.'

"Emphasis was placed upon the fact that a valid will operates as an alienation within the meaning of Congressional enactments. The conclusion is inescapable that the language in *Caesar* v. *Burgess* was carefully chosen for the purpose of restricting the decision to the narrow question involved, to-wit, a contest of the probate of a will, and the basis for the decision is that it is in the nature of an equitable proceeding affecting title to real estate and involving alienation of real property. The decision of the Circuit Court in each instance wherein the right of removal is discussed is

based upon the fact that title to land, or issues, rents and profits therefrom, was involved.[3]

"This is in keeping with the legislative history of this legislation. In the Report of the Committee on Indian Affairs submitted by Mr. Hastings, Congressman from Oklahoma, he made this statement:

> 'This bill was introduced in the later part of the last session of the Sixty-eighth Congress and extended hearings were held on it, but no report was made, and the same was reintroduced in the present session of Congress. It contains three sections.
>
> 'The first section amends Section 9 of the Act of May 27, 1908, and deals with the approval of conveyances made by full-blood heirs of deceased allottees of the Five Civilized Tribes. It is for the purpose of stabilizing titles and will be of benefit to all land owners in eastern Oklahoma, Indian and white, in that the title of lands of deceased allottees may be made more definite and certain, and there will be less difficulty with reference to same.
>
> 'Section 2 extends the statute of limitations to the restricted Indians of the Five Civilized Tribes. It does not affect any pending lawsuit, and it gives two years additional time in the event the statute of limitations is about to run within which to institute any suit wherein the interests of a restricted Indian of the Five Civilized Tribes is involved.
>
> 'Section 3 provides only where the interest of a restricted Indian of the Five Civilized Tribes is being litigated in the State Courts that service may be had upon the Government, and the Government is given the right to choose the forum in which the suit may be tried and may transfer such case to

3. Hosey, et al., v. Kennamer, et al., 21 F. (2d) 64; Fish, et al., v. Kennamer, 37 F. (2d) 253; United States, et al., v. Mid-Continent Petroleum Ass'n, 67 F. (2d) 37; McKay v. Rogers, 82 F. (2d) 795; Whitechurch v. Crawford, 92 F. (2d) 249; Caesar v. Burgess, 103 F. (2d) 503; United States v. Fixico, et al., 129 F. (2d) 389.

the United States District Court upon motion in the event that the Government chooses to do so. If said case is not transferred the decision of the court is final, and it would prevent a new suit from being instituted for and on behalf of a restricted Indian thereafter by the Government. The entire bill is designed to stabilize titles in eastern Oklahoma and it is expected that it will add value to these lands. The bill has the approval of the Secretary of the Interior, as evidenced by the report which is attached hereto and made a part of this report.'

"It will be noted that Congressman Hastings who was a lawyer, used the terms 'suit' and 'case' interchangeably, and referred to the fact that the government would be prevented from instituting a new 'suit.' The 'new suit' mentioned by the Congressman could not possibly be a probate proceeding because no one contends that the government may institute a probate proceeding. The 'extended hearings' mentioned by Congressman Hastings discloses that no mention was ever made concerning a probate proceeding. I have carefully read the hearing before the subcommittee of the Committee on Indian Affairs, House of Representatives, Sixty-eighth Congress, Second Session, printed and published by the Government Printing Office, dated January 6, 1925. A probate proceeding is nowhere mentioned. Seven attorneys from Oklahoma appeared before this subcommittee to present to the committee the necessity and purpose for such legislation. Briefly stated, the necessity was due to the fact that no statute of limitations was applicable to restricted Indians under the decisions of the court, and a judgment against an Indian, involving restricted lands, was not binding upon either him or the United States Government, the result being that there was no such thing as a good title derived from a restricted Indian. The other involved the uncertainty as to the proper County Court for the approval of a deed by a full-blood Indian heir. The Hon. James B. Diggs, of

Tulsa, Oklahoma, made an extended statement before the committee, in which he said:

> 'Our court has held that the statute of limitations does not apply to any Indian until 15 years from the removal of his restrictions. * * * Another condition that exists there (in Oklahoma) is this: An Indian may sue you on a question of title. If he recovers the judgment is good against you as claimant and he gets the land, but if the Indian fails in that suit the Indian nor his heirs are not bound. So the condition exists in Oklahoma that the Indian can sue you and you can win. The Indian can appeal that case from the lower court to the Supreme Court of Oklahoma and you win. The case may then be appealed from the Supreme Court of Oklahoma to the United States Supreme Court and you win again and yet your title is not acquired. * * * After you have done all this, Mr. Indian or his heirs can turn around and sue you again, and you go through the same process to the United States Supreme Court and still your title is not good, though you have won, and then on top of all that the United States can bring a suit retrying identically the same question.'

"The statement of the Honorable C. B. Ames, General Counsel for the Texas Company, and formerly Solicitor General of the United States, was substantially to the same effect. None of the gentlemen from Oklahoma made any complaint concerning the remedy provided by the Act of June 14, 1918 (40 Stat. 606).[4]

"The contention is now made that in a probate proceeding the probate court may determine the heirs of a decedent and therefore title to real estate is involved.

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4. Section 1 of said Act provides in part as follows: "that a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the Probate Court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estate of deceased persons, *shall be conclusive of said question.*" (Emphasis supplied.)

No court has ever said so. The authority of the County Courts of Oklahoma to determine the question of fact of who are the heirs of a deceased allottee of the Five Civilized Tribes leaving restricted heirs is found in the Act of Congress approved June 14, 1918, *supra*. It is to be presumed that Congress, in passing the Act of June 14, 1918, and the Act of May 12, 1926, were aware of a limitation upon the jurisdiction of the probate courts or County Courts of Oklahoma, as follows: 'Provided that the County Court shall not have any jurisdiction in any action * * *or in any matter wherein the title or boundaries of land may be in dispute or called in question.' Sec. 12, Art. 7, Constitution of Oklahoma.

"The statutes of Oklahoma provide that in a probate proceeding incident to the final settlement of the accounts of an administrator and the distribution of the funds remaining, the court may determine the heirs of the decedent. Prior to the passage of the Act of 1918 the authority for such a determination was found in Sections 6463, 6464, 6466 and 6488, Revised Laws 1910. After the passage of the Act of 1918, and in the year 1919, the Oklahoma Legislature passed an act designed to enable the Oklahoma courts to comply in every particular with the express wish of Congress as contained in the Act of 1918. 84 O. S. A. 251, *et seq.* Cf. *Hardridge* v. *Hardridge*, 168 Okl. 7; *Heatherington* v. *Foster*, 173 Okl. 440; *Gassin* v. *McJunkin*, 173 Okl. 210. It has never been considered in Oklahoma that this provision for the determination of heirs incident to the settlement of an estate is violative of the Constitutional provision, *supra*.

"The courts of Oklahoma recognize the plenary authority of Congress to legislate for full-blood members of the Five Civilized Tribes concerning their restricted lands, and in construing the authority of the County Courts under the Act of 1918, have scrupulously recognized that power. *State, ex rel. Miller*, v. *Huser*, (Okfuskee County Judge) 72 Okl. 130. No effort is made to apply said act where all the heirs are unrestricted. *Moore* v. *Jefferson*, 190 Okl. 67. In order to

enter a valid decree of heirship in a probate proceedings under said act, the court must acquire jurisdiction of unrestricted assets. *Moore* v. *Jefferson, supra; Hardridge* v. *Hardridge, supra.* Probate courts of Oklahoma do not assert jurisdiction over restricted property of Indians. *Cowokochee* v. *Chapman*, 90 Okl. 121; *Rayburn* v. *Carney*, 170 Okl. 255; *Barnard* v. *Bilby*, 68 Okl. 63. In a probate proceeding under the Act of 1918, the court does not try title to land. *In re Jackson's Estate*, 117 Okl. 151; *Arnold* v. *Willis*, 105 Okl. 172. An owner of an interest in land purchased prior to the date of the passage of the Act of 1918 is not brought into nor bound by probate proceedings instituted thereunder. *Homer* v. *Lester*, 95 Okl. 284. In probate probate proceedings under said Act of Congress the County Courts of Oklahoma act as an administrative agency of the United States Government to determine the question of fact as to who are the restricted Indian heirs of a deceased citizen allottee of the Five Civilized Tribes of Indians. *State, ex rel. Miller*, v. *Huser, supra*, wherein the court said: 'The words "the question of fact" were employed by Congress to make clear its purpose that the agencies designated were to exercise administrative functions as distinguished from strictly judicial functions.' The court in *State, ex rel. Miller*, v. *Huser*, did not find it necessary to determine whether or not said act conflicted with the constitutional provision limiting the jurisdicton of probate courts in Oklahoma, nor whether title to real estate is involved. In the opinion the court compares the finding of fact of heirship made by the County Court as similar to the action of Congress in making the approved rolls conclusive as to the quantum of blood of an enrolled Indian. The opinion of the Supreme Court in the *Huser* case was referred to in *McDougal, et al.*, v. *Black Panther Oil and Gas Co., et al.*, 273 F. 113, as 'exhaustive, instructive, and convincing.' The Federal Courts have concurred with the opinion in the *Huser* case as to the nature of the proceedings had in the County Court.

"'The County Court in such capacity, is in effect

a Federal agency acting with the same result as if it was done by the Superintendent of the Five Civilized Tribes, the Commissioners of the Land Office, or the Secretary of the Interior.' *In re Jessie's Heirs*, 259 F. 694.

"Cf. *Barnett* v. *Kunkel, et al.*, 259 F. 394; *Marcy* v. *Board of County Commissioners*, 45 Okl. 1; *Knight, et al.*, v. *Carter Oil Co.*, 411 Okl. 300.

"Congress has never, in my opinion, intentionally enacted any legislation requiring the United States District Court, or any other Federal Court, to act in an administrative capacity. To contend that by the language of Section 3 of the Act of 1926 Congress intended to substitute the United States District Courts in eastern Oklahoma for the County Courts in Oklahoma in performing an administrative act and becoming an instrumentality of the Federal Government in an administratvie capacity is difficult to believe, and it is still more difficult to believe that Congress intended that in the conversion of the United States District Court from a court into an administrative agency it would thereby convert the United States District Court into a probate court.

"County Courts of Oklahoma since the Act of Congress of 1908, (35 Stat. 312) have been authorized to approve deeds of full-blood Indian heirs to inherited lands. In so doing they act as a Federal agency in an administrative capacity. So far, no one has assumed that such a proceeding may be removed to the Federal Court under Section 3 of the Act of 1926.

"It is doubtful if title to land is involved in the determination of heirship under the Act of 1918. *State, ex rel. Miller*, v. *Huser, supra.* The first instance in which the government contended that title to land was involved in the proceeding for the determination of heirs had in the County Court was in *Roberts* v. *Anderson; et al.*, 66 F. (2d) 874, 879. The contention was first made on appeal. The decision on appeal did not turn upon such contention. Judge McDermott, however, in the opinion commented upon this situation as follows;

'The act (Act of 1926) does not clearly refer to heirship proceedings in the probate court; nor are probate proceedings ordinarily removable; an heirship proceeding may indirectly affect the title to lands, or it may not. The point is not necessary to a disposition of the cause, and Congress may clear up any uncertainty that exists before it again arises. We therefore leave it as we find it.'

"Congress has not taken any steps to clear up the situation which Judge McDERMOTT mentioned. A decree of heirship does not operate directly or indirectly to transfer lands. Title to inherited lands vests by operation of law in the heirs of the deceased at the moment of his death. The contention advanced in *Roberts* v. *Anderson, supra,* apparently was abandoned in *United States* v. *Hellard,* 322 U. S. 363, wherein the Supreme Court had under consideration the Act of June 14, 1918 (40 Stat. 606). One section is that providing that the probate courts of the State of Oklahoma may determine heirs of any deceased allottee of the Five Civilized Tribes who might die leaving restricted heirs. The court said:

'It seems clear from the language of the Act of June 14, 1918, and its legislative history (S. Rep. No. 330, 65th Cong. 2d Sess.) that Congress vested in the Oklahoma state courts jurisdiction to determine heirship in these restricted lands (para. 1) and jurisdiction to partition them. See *Salmon* v. *Johnson,* 78 Okl. 182, 189 P. 537; *United States* v. *Bond,* 108 F. (2d) 504. The authority of Congress to select state tribunals to perform such functions is clear. *Parker* v. *Richard,* 250 U. S. 235; *Harris* v. *Bell,* 254 U. S. 103; *Stewart* v. *Keyes,* 295 U. S. 403. But a grant of jurisdiction to a particular court without more does not determine what parties are indispensable to the proceedings in question. *Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under para. 2 of the Act of June 14, 1918.* (Emphasis supplied.) Since restrictions on alienation do not prevent inheri-

tance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature, and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made *that tribunal the exclusive agency to effectuate the Federal policy but also has dispensed with any requirement that the United States be a party to the proceedings.*' (Emphasis supplied.)

"The Act of 1926 provides for service of notice upon the United States in those actions wherein the United States is an indispensable party in order that the judgment rendered therein may be binding upon the United States Government. It seems to follow, as the night does the day, that the converse of that is true, to-wit if the United States Government is bound by the proceedings without being made a party, then the notice is not required to be served, and if served, it is inoperative to effect a removal or to give jurisdiction to the court to which the proceedings are transferred. From a practical standpoint there are many objections to the removal of such a proceedings, but while the practical objections should not out-weigh a clear mandate of an Act of Congress, such practical objections certainly are worthy of such consideration in determining whether or not Congress intended that which is now sought. For example, in this case the County Court has already appointed administrators. They have qualified under the law of Oklahoma. They are officers of the County Court of Okfuskee County, Oklahoma. If this court is to become a probate court and administer the unrestricted assets of Peter Micco, deceased, is it required to do so with administrators appointed by the state court? May this court discharge said administrators and appoint new ones, although the jurisdiction of the County Court to make the appointment is exclusive? *Merrell* v. *United States, supra.* If the discharged administrators should desire to appeal, to what court would they appeal? Would this court give notice to creditors, and if so, how? Would

this court be required to approve and disapprove claims after approval or disapproval by the administrator? In the progress of the administration in this court, what law would govern as to an appealable order, and in the event of an appeal what would become of the right of the appellant to a trial *de novo* which he has upon appeal from the County Courts to the District Courts of Oklahoma? The practical result of this removal is the same as if an injunction should issue by this court prohibiting the County Court from proceeding for the purpose of having this court rather than the County Court determine the question of fact of who are the heirs of Peter Micco, deceased. The reason for having that determination here rather than the County Court is difficult to divine. Some may conceive that it may be done better in the Federal Court. It might, or it might not. Federal Courts and state courts are supposed to work in comity, each respecting the field allocated to the other, under our system of government. A procedure which would oust the County Court of its jurisdiction in certain selected proceedings, unless clearly warranted under some Act of Congress, is a radical departure from that traditional concept of our government and should originate in Congress rather than in the courts.

"In the final analysis, all that is attempted here is to remove a probate proceedings from the County Court and thereby prohibit the County Court from proceeding further, and thereupon have this court exercise its traditional equity powers—not probate powers—in determining two things, to-wit: what property is restricted, and the fact of who are the heirs of the deceased. This court has at all times been available in an original action to determine these questions. Its jurisdiction in an original action is clear. Certainly its jurisdiction in a removed action is doubtful. In my judgment its lack of jurisdiction is clear.

"For the reasons stated herein, the complaint in intervention filed by the United States Government is dismissed, without prejudice to the filing of a complaint

herein seeking the same or similar relief. The complaint in intervention filed on behalf of Sherman Micco is dismissed. To which action of the court the Government and Sherman Micco except.

"The proceedings are remanded to the County Court of Okfuskee County, Oklahoma.

/s/ Eugene Rice,
United States District Judge."

The Act of May 27, 1908 (35 Stat. 312), substituting the County Courts of Oklahoma for the Secretary of the Interior as a federal agent to approve full-blood conveyances made no provision for a determination of heirship of deceased allottees. The courts were therefore without jurisdiction to enter a binding decree determining the heirs of deceased allottees in so far as their restricted lands were concerned. *Wolfe* v. *Gills*, 96 Okl. 6, 219 Pac. 350; *Cowokochee* v. *Chapman*, 90 Okl. 121, 215 Pac. 759, certiorari denied 263 U. S. 317. The functioning of the County Court in approving deeds was purely administrative. *Haddock* v. *Johnson*, 80 Okl. 250, 194 Pac. 1077; *Malone* v. *Wamsley*, 80 Okl. 181, 195 Pac. 484. The court was not bound by the probate rules promulgated by the Supreme Court. *Haddock* v. *Johnson, supra.* It was not necessary that the approval by the court be embodied in a formal order or journal entry. *Camel* v. *Dick*, 157 Pac. 1062. There was no appeal from the order of the County Court approving a deed. *Coachman* v. *Malone*, 185 Okl. 465.

The Act of January 27, 1933, amended the Act of May 27, 1908, and provided procedure to be followed in approval cases. The approval must be in open court, after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma. It required the appearance of probate attorneys in approval matters and gave the right of appeal from the order of the County Court to the District Court. However, this act did not

change the status of the County Court, functioning as a federal agent, for this specific purpose, from an administrative to a judicial officer.

Section 1 of the Act of June 14, 1918, making the County Court a federal agent for the specific purpose of "determining the question of fact as to who were the heirs of full-blood Indians," specifically provided for the right of appeal from the action of the County Court. Evidently Congress had in mind the functions, already being performed by the County Courts, in approval of deeds and that the right of appeal did not exist unless specifically granted. In the case of *State* v. *Huser, supra,* the Oklahoma Supreme Court defined the functions of the County Court, operating under the Act of June 14, 1918, as follows:

> *"The words 'the question of fact' were employed by Congress to make clear its purpose that the agencies designated were to exercise administrative functions as distinguished from strictly judicial functions.*
>
> "We are of the opinion then that, when heirship of a deceased allottee leaving restricted Indian heirs is established as a question of fact by the County Courts as administrative agencies of the Federal Government under the procedure provided by the act such determination becomes conclusive evidence of that fact and bears the same relation to that issue, when the same arises in an action in the courts, as do the approved rolls as to quantum of blood and the enrollment records as to the age of a member of said tribes."

The above case has been consistently followed by the Oklahoma courts and Federal courts.[1]

The obvious purpose of Congress in the enactment of Section 1 of the Act of June 14, 1918, was to vest the courts

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1. For other cases supporting this same conclusion see: In re Fulsom Estate, 85 Pac. 13; State v. Wilcox, 182 Pac. 673; McDougal v. Black Panther Oil and Gas Company, 273 Fed. 113; Sturm v. Dyer, 113 P. (2d) 378; Owen v. Kitchen, 232 Pac. 797; Plummer v. Childers, et al., 224 Pac. 298.

of Oklahoma with jurisdiction to determine the heirship of full-blood allotees, in order that full-blood Indian heirs might convey a merchantable title to inherited lands and thus receive for them a sum commensurate of the value of said land. The act specifically provided that the action of the County Court decreeing the heirs of full-blood Indians *should be conclusive* of said question and both State and Federal Courts have so construed it. *State* v. *Huser*, 76 Okl. 130, 184 Pac. 113; *In re Fulsom Estate*, 141 Okl. 300, 285 Pac. 13; *Pitman* v. *Commissioner of Internal Revenue*, 64 F. (2d) 740; *Roberts* v. *Anderson*, 66 F. (2d) 874; *United State* v. *Hellard*, 88 L. ed. 929.

The 1926 Act was not passed as a removal statute. It was designed to stabilize titles in Eastern Oklahoma. The need for such legislation was contained in a report by the Committee of Indian Affairs, submitted by Mr. Hastings, Congressman from Oklahoma, a part of which is incorporated in Judge RICE's opinion. It will be noted that there is no mention made, in this report, of any defects in the probate procedure, nor that judgments of County Courts operating under Section 1 of the Act of 1918 were not conclusive. No court had ever held this procedure defective and no lawyer, so far as we know, had ever contended that the Government was a necessary party to a case in the County Court, the act had stood the test in both State and Federal Courts. *State* v. *Huser*, 76 Okl. 130, 184 Pac. 113; *In re Jessie's Heirs*, (1919) 259 Fed. 694; *McDougal* v. *Black Panther Oil and Gas Company*, (1921) 273 Fed. 113.

The County Courts had been operating under the 1918 Act for eight (8) years at the time the 1926 Act was before Congress. If the findings of the County Court operating under Section 1 of said act was not conclusive against the Government this fact would have been presented to the Congressional Committee by the Oklahoma lawyers who

were seeking relief for defective titles and would have been a part of its report. The legislative history of the Act of 1926, together with the descriptive words used in Section 3 of said act, conclusively show Congress did not have in mind Section 1 of the Act of 1918 when the 1926 Act was passed. Section 3 reads in part: "Any one or more of the parties to a *suit* in the United States Court of the State of Oklahoma or in the state courts of Oklahoma * * *." We submit that the word *suit* in its commonly accepted meaning refers to civil actions in the state courts and is not properly or usually applied to probate matters. The act in referring to *parties to the suit* does so by referring to them as "plaintiffs," "defendants" and "interveners." These nouns are used to designate parties in civil actions only and are unknown to probate practice in Oklahoma. Process, provided for under this section, is comparable to process in the civil courts. For instance, service of notice is to be made within ten (10) days, the usual time provided for in return of summons in the District and Superior Courts. The act further provides, "If return of service thereof be not made within the time allowed by law, for the return of service of summons, alias notice may be given. * * *" Summons in Oklahoma refers to process in the civil courts and is unknown to probate practice in this state. Twenty (20) days was allowed after the service of notice on the Superintendent of the Five Civilized Tribes to plead. This is the same time allowed defendants to plead or answer in civil actions hence the references to *suits*, *parties* and *process* in Section 3 of said act refer to actions in the civil courts and not probate proceedings.

County Courts Do Not Try Title of Land in Determining Heirs Under the 1918 Act.

The extent of the authority, or jurisdiction, conferred on the County Court by Section 1 of the 1918 Act was first

presented to the Oklahoma Supreme Court in the case of *Homer* v. *Lester*, 95 Okl. 284, 219 Pac. 392, certiorari denied 264 U. S. 580. The identical question presented in that case was whether or not a judgment of the County Court operating under the 1918 Act was conclusive against purchasers from heirs, or alleged heirs, who purchased prior to the passage of the act. The court in its opinion used the following language:

> "An examination of this Act of Congress fails to disclose any intention to confer upon the County Courts jurisdiction to try title of land, it being clearly the intent of the act to empower the County Courts, as an incident to the administration of an estate of a restricted Indian leaving restricted heirs, to determine the beneficiaries of the estate, that is, the heirs as between the petitioner for determination and all other persons claiming to be heirs."

The opinion in this case is lengthy. The court reviewed the history of Indian litigation in Oklahoma, citing numerous authorities of both State and Federal Courts, on the jurisdiction of the County Court operating under the 1918 Act to try title, under the restrictions of the Oklahoma Constitution, Art. 7, Sec. 12, which specifically denied such jurisdiction to County Courts. Concluding its opinion the court used the following language:

> "We therefore conclude that the Heirship Act of Congress does not undertake to confer any jurisdiction upon the County Courts to try title to land, and that the County Court's judgment rendered under the authority of that act is binding on all persons claiming to be heirs, and binding on all persons who purchased from alleged heirs after the institution of proceedings to determine heirship, but not binding on parties who purchased from alleged heirs prior to the passage of the act and at a time when the allotment was not subject to administration proceedings on behalf of creditors."

This same conclusion was reached by our Supreme Court in the cases of *Plummer* v. *Childers*, 224 Pac. 298; *In re Jefferson's Estate*, 221 Pac. 247, and *Sturm* v. *Dyer*, 113 P. (2d) 378; *Swirtz* v. *Dorl*, 253 Pac. 75-76.

The opinion in the above case was written by Judge KENNAMER, who was then a member of Oklahoma Supreme Court. Judge KENNAMER was later appointed Federal District Judge for the Northern District of Oklahoma and acting in that capacity wrote the opinion in *Anderson* v. *Peck*, 53 F. (2d) 257, referred to by the Government in its brief. In the above case Judge KENNAMER reaffirmed the rule of law announced in the *Homer* v. *Lester* case. We quote from the opinion:

> "A proceeding to determine heirship under the statutes above cited does not try and determine title; it merely establishes the fact as to the heirship. *Homer* v. *Lester*, 95 Okl. 284, 219 P. 392; *In re Jackson's Estate*, 117 Okl. 151, 245 P. 874. The Federal District Courts have jurisdiction to ascertain who are the restricted heirs of restricted full-blood Indians, and the Act of Congress of June 14, 1918, *supra*, did not repeal or terminate that jurisdiction. The above Act of Congress vested concurrent jurisdiction in the probate courts of Oklahoma with the jurisdiction vested in the Federal District Courts for such determination. *McDougal* v. *Black Panther Oil & Gas Co.*, (C. C. A.) 273 F. 113."

The case of *Caesar* v. *Burgess*, 103 F. (2d) 503, originated in the County Court of Seminole County, Oklahoma. It involved the contest of a will. The case was removed to the Federal Court of the Eastern District of Oklahoma under the 1926 Act. The question of jurisdiction of the court in the removed case was first raised in the Circuit Court. In its opinion by Judge BRATTON the court held, as a basis for its opinion on the jurisdictional question, that an interest in land is determined in such a proceeding by saying

"The effect of a valid will operates as an alienation of property."

The court in its opinion failed to distinguish between *'a valid executed will'* and a *'will validly passing title.'* The first question *'valid execution'* must be determined by the County Court when the will is admitted to probate. The second question, *'valid alienation'* cannot be determined by the County Courts in Oklahoma.

This status is firmly fixed in our law and decisions. It is illustrated by the cases which hold that although a will may be admitted to probate as validly executed, that judgment does not establish the will as a valid alienation. *Phillips* v. *Smith*, 186 Okl. 636, 100 P. (2d) 294; *Coats* v. *Riley*, 154 Okl. 291, 7 P. (2d) 644; *Matz* v. *Gill*, 147 Okl. 199, 286 Pac. 441; *Armstrong* v. *Letty*, 85 Okl. 205, 209 Pac. 168; *Hale* v. *Buckholtz*, 75 Okl. 196, 183 Pac. 42; *Letts* v. *Letts*, 73 Okl. 313, 176 Pac. 234. Both *Armstrong* v. *Letty* and *Coats* v. *Riley* are cited by the Circuit Court in *Caesar* v. *Burgess* on the point that requirements of the Act of April 26, 1906, as amended by the Act of May 27, 1908, are no part of the due execution and attestation of wills (pages 508-509), but the Oklahoma Supreme Court held further in these decisions that since the requirement of the Federal Act affected the validity of the will as an instrument passing title (as alienation), the County Court had no power to determine whether that had been performed. This conclusion of the Oklahoma Court was not referred to in the decision of the Circuit Court. If it is given effect, it destroys the basis of that decision.

The holding in the *Peter Micco* case conforms to the decisions of this court. *United States* v. *Bowling*, 256 U. S. 484, 65 L. ed. 1054; *United States* v. *Hellard*, 88 L. ed. 929. In the *Bowling* case this court held that an order made by the Secretary of the Interior, acting under the authority of

the Act of June 25, 1910 (26 Stat. at L. 855), decreeing the heirs of restricted Indians, was valid and conclusive. The act above referred to after granting authority to make such a finding, specifically provided the "findings of the Secretary of the Interior should be final and conclusive of said question."

It is interesting to note that the language used in the above act, giving the Secretary of the Interior authority to determine heirs of restricted Indians in a certain class, is similar to the language used in Section 1 of the 1918 Act making the County Courts of Oklahoma federal agents to determine the question of fact as to the heirs of deceased restricted Indians. Referring to the effect of the County Court's findings, the 1918 Act specifically states that said findings *shall be conclusive of said question.* Apparently Congress conferred on the County Courts of Oklahoma the same authority to determine the question of fact as to who are the heirs of restricted Indians of the Five Civilized Tribes, it had previously given the Secretary of the Interior in the Act of June 25, 1910. We seriously doubt that counsel will contend that the Government was a necessary party to a valid decree made by the Secretary of the Interior.

In the brief filed by the Government in the case of *United States* v. *Hellard,* 88 L. ed. 929, it was conceded that the Government was not a necessary party in an action to decree heirs by the County Court. We quote from their brief:

> "The United States is not a necessary party to proceedings to determine heirship because the only interests directly involved in such proceedings are those of heirs. No governmental interest of the United States is directly involved, inasmuch as the restrictions on alienation do not prevent inheritance. Cf. *Hy-yu-tse-mil-kin* v. *Smith,* 194 U. S. 401, 413-414. Moreover, the determination of heirship does not directly affect the

restrictions on the land or the land itself. The restricted property of the deceased Indian is not within the jurisdiction of the probate courts and is not subject to administration by those courts. *Cowokochee* v. *Chapman*, 90 Okl. 121, 124, 215 Pac. 759 (1922), certiorari denied 263 U. S. 713; *March* v. *Peter*, 179 Okl. 207, 212-213, 64 P. (2d) 912 (1936). By nature a proceeding to determine heirs is such that a probate court may render a valid judgment even though it does not have before it all possible claimants to heirship."

For the rule announced by this court in the above case we quote from the opinion:

"Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under Sec. 1 of the Act of June 14, 1918. Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made that tribunal the exclusive agency to effectuate the federal policy but also has dispensed with any requirement that the United States be a party to the proceedings. See *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, 413, 414, 48 L. ed. 1039, 1045, 1046, 24 S. Ct. 676; *Winton* v. *Amos*, 225 U. S. 373, 392, 65 L. ed. 684, 694, 41 S. Ct. 342."

No governmental interest being involved in a proceeding under Section 1 of the Act of 1918, the Government not being a necessary party to such a proceeding for a final and conclusive determination of the issues notice under Section 3 of the Act of 1926 was not authorized. The cause was improperly removed from the County Court of Okfuskee County to the Federal District Court of the Eastern District of Oklahoma and was therefore properly remanded back to said County Court.

To follow the procedure in the *Barnett* case by remanding the probate proceedings to the County Court with the Federal Court retaining jurisdiction to decree the heirs of Peter Micco, deceased, will leave unsettled and unexplored the question and extent of functional jurisdiction remaining in the County Court in the cause so remanded. With such a state of affairs could the County Court decree the heirs and distribute the unrestricted estate? Could it partition the lands belonging to the estate as was done in *United States* v. *Bonds*, 108 F. (2d) 504? In other words, can the Federal Court in such a proceeding deprive the County Court of the concurrent jurisdiction lodged in that court under the 1918 Act and as recognized and affirmed in the holdings of the courts in the cases of *State* v. *Wilcox*, 75 Okl. 158, 182 Pac. 673; *March* v. *Peter*, 179 Okl. 207, 62 P. (2d) 915; *McDougal* v. *Black Panther Oil & Gas Company*, 273 Fed. 113; *Roberts* v. *Anderson*, 66 F. (2d) 874; *Wells* v. *Helms*, 105 F. (2d) 402. Such a holding will be equivalent to the clothing the Federal Courts with power to enjoin the County Courts from exercising their prerogative as a federal agent possessing concurrent jurisdiction with the Federal Courts, which under the law cannot be done. To so hold will enable the Federal Courts to do indirectly that which they are prohibited by law from doing directly.

It is interesting to note that in *United States* v. *Anglin & Stevenson*, *supra*, the Government contended that under Section 1 of the Act of 1918, the probate courts of Oklahoma acquired jurisdiction to determine only the fact of who were the heirs of restricted Indians, the case *(Jackson Barnett)* having been originally filed in the probate court of Muskogee County and removed to the Federal Court; that the Federal Court derived no greater jurisdiction than that which was conferred upon the County Court, and that it had no equity jurisdiction and for that reason could not

allow attorneys' fees out of restricted funds belonging to the estate. In the opinion the court referred to the fact that the two suits commenced in District Courts of Muskogee and McIntosh Counties were, in equity, to quiet title to real estate located in the respective counties which belonged to the estate; in each case the general equity powers of the court were invoked for the purpose of equitable relief. These cases were removed to the Federal Court and consolidated with the heirship proceedings and in deciding the jurisdictional question the court used the following language:

> "In any event, it is clear that the trial court possessed all of the equity jurisdiction which existed in the *state district courts*, from which the cases were removed."

It will be noted that the court did not base its judgment on jurisdiction obtained in the removed probate case, but on the jurisdiction in the removed equity cases.

In this same opinion the Circuit Court recognized the concurrent jurisdiction of the County Court operating under Section 1 of the Act of 1918, with the jurisdiction of the State and Federal Courts, and we quote from the opinion:

> "Ordinarily, the jurisdiction of the Federal Court on removal under the General Removal Act, Section 28 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 71, is measured by the jurisdiction of the court from which the case was removed. *Booth* v. *Merchants National Bank*, 5 Cir., 100 F. (2d) 478. But the jurisdiction to determine heirship of a deceased Indian citizen conferred upon the County Court of Muskogee County by Section 1 of the Act of 1918, is not exclusive. State and Federal District Courts are also authorized to determine heirship of a restricted Indian citizen of the Five Civilized Tribes concurrently with the probate court as a necessary incident to the exercise of their original and general jurisdiction. *State* v. *Huser*, 76 Okl. 130,

183 P. 113, 122; *State* v. *Wilcox*, 75 Okl. 158, 182 P. 673; *March* v. *Peter*, 179 Okl. 207, 64 P. (2d) 912; *McDougal* v. *Black Panther Oil & Gas*, 8 Cir., 273 F. 113; *Roberts* v. *Anderson*, 10 Cir., 66 F. (2d) 874; *Anderson* v. *Peck*, D. C., 53 F. (2d) 257; *Homer* v. *Lester*, 95 Okl. 284, 219 P. 392."

The Government in its brief asserts "that the decision in the *Peter Micco* case is a departure from the established law and creates doubt as to the validity of the numerous titles and property rights." So far as we have been able to establish from cases that have proceeded to judgment, very few probate cases have been removed to the Federal Court. "*In re Jessie's Heirs*," 259 Fed. 694, was the first case removed after the passage of the Act of June 14, 1918. This was not an ordinary administration case, but was a special proceeding filed in the County Court of Okfuskee County to determine the heirs of Harper Jessie, deceased full-blood member of the Creek Tribe of Indians, under the provision of the Act of June 14, 1918. In an able and well considered opinion, Judge WILLIAMS, Federal District Judge, sustained the motion to remand the case to the County Court. Referring to the 1918 Act, the court used the following language:

> "The Act of June 14, 1918, applying only to restricted lands and to full-blood members of such existing tribes, was a valid exercise of legislative power by Congress. In conferring this authority upon the County Courts of the state, it is presumed that Congress considered the provisions of the State Constitution. The County Court in such capacity is, in effect, a federal agency, acting with the same result as if it was done by the Superintendent of the Five Civilized Tribes, the Commissioner of the Land Office, or the Secretary of the Interior. *Barnett* v. *Kunkel, supra; Marcy* v. *Board of Commissioners*, 45 Okl. 1, 144 Pac. 611. The Seventh Legislature in passing the Act of April 4, 1919, (Chapter 25, Session Laws Okla. 1919) obviously had in mind the Act of Congress of June 14, 1918."

The court further held:

> "The county or probate courts of this state may not exercise a jurisdiction conferred under the Act of Congress June 14, 1918, if, in so doing, it would contravene Section 12 of Article 7 of the Constitution of Oklahoma."

The court concluded the 1918 Act did not violate Section 12, Article 7 of the Constitution of Oklahoma as it did not attempt to give County Courts jurisdiction to try title to land. Title not being involved, no federal question was presented, therefore, the case was improperly removed.

The next administration case was the *Jackson Barnett* case, 4556 Equity, U. S. D. C., Judge WILLIAMS in an unreported opinion referred to by the Government in its brief, remanded the administration proceedings but retained jurisdiction to decree heirs, the case being consolidated with equity cases transferred from District Courts from McIntosh and Muskogee Counties. In his opinion, Judge WILLIAMS refers to his holdings in the *In re Jessie's Heirs*, 259 Fed. 694, and explains the reversal of his previous decision in the *Jessie's Heirs* case as follows:

> "*In re Jessie's Heirs*, 259 Fed. 694, was when the county judge was acting as a federal agent and not as a court and prior to the Act of April 12, 1926."

We submit that there is nothing in the Act of April 12, 1926, that changed the authority or jurisdiction of the County Courts operating under Section 1 of the Act of June 4, 1918. It cannot be said that these two conflicting opinions establish a precedent.

The next case to proceed to an opinion was the case of *In re Palmer's Will*, 11 Fed. Supp. 307. The opinion by Judge WILLIAMS, District Judge, involved the will of a full-blood Indian. The will was admitted to probate by the County Court of Coal County. The case was appealed to

the District Court; thereafter notice was served in pursuance to Section 3 of the Act of 1926 and the case was removed to the Federal Court. Referring to the effect of the removal, Judge WILLIAMS in his opinion, 306, used the following language:

> "The removal of this case does not bring here the entire settlement of the estate or have the effect of taking away from the state probate court settlement of the estate, except as to the validity of the execution of a will by a restricted member of the Five Civilized Tribes alienating restricted Indian allotment, or restricted Indian lands, and restricted rents, incomes, issues, proceeds and profits derived therefrom, the parties thereto interested therein being members of the tribe. It will be presumed that the state probate courts will respect the adjudication which may be made here as to such matters. *Watterman* v. *Canal Louisiana Bank Company*, 64 L. ed. 80."

If Congress had in mind the removal of that part of a probate case referred to by Judge WILLIAMS, in the opinion of the above case, we think they would have made provisions for such a procedure. On the contrary the act provides that when notice is served, under the provisions of the act, the state court shall "accept such petition and proceed no further in said suit." In referring to the jurisdiction of the Federal District Court in the removed action the act provides "the cause shall then proceed in the same manner as if it had been originally commenced in said District Court." This indicates the transfer of all the issues involved in the suit, transferable under the act, and not just a part of them. If all the issues involved in the suit were not transferable under Section 3 of the act, we submit that no part of the suit is transferable.

The next case was the case of *Caesar* v. *Burgess*, 103 F. (2d) at page 934, heretofore referred to in this brief.

Following the case of *Caesar* v. *Burgess*, this court in the case of *United States* v. *Hellard*, 322 U. S. 363, for the first time passed on this question and held the Government was not a necessary party in a suit to decree heirs by the County Court under Section 1, 1918 Act.

We agree with the Government that there are hundreds of titles involved in the outcome of this case. County Courts have been decreeing heirs under the 1918 Act for now almost twenty-eight (28) years. The 1918 Act had been in force eight (8) years at the time the 1926 Act was passed. No notices were served during this eight (8) years although hundreds of cases were decided by the County Courts during that time. Since the passage of the 1926 Act very few notices have been served in County Court cases, it being the general opinion of the lawyers that such notice was not necessary in probate cases. To hold the Government a necessary party and the service of notice on the Superintendent under the provisions of Section 3 of the 1926 Act essential to the finality of the County Court's decrees, would place in doubt hundreds of titles. The holding in the *Peter Micco* case definitely settles the title of all those cases where notice was not served upon the Superintendent as required by Section 3 of the 1926 Act and certainly it would not place a cloud upon any title where such a notice was served.

The conclusions of the court in the *State ex rel.*, v. *Huser*, 76 Okl. 130, 184 Pac. 143, and of *McDougal* v. *Black Panther Oil & Gas Company*, 273 Fed. 113, and many other cases referred to herein have been impliedly written into hundreds of land titles on the eastern side of Oklahoma and the results of these decisions should not be disregarded. *McDougal* v. *McKay*, 237 U. S. 372, 59 L. ed. 1001.

Conclusions.

We submit that the order entered on March 6, 1945, remanding the *Peter Micco* case to the County Court of Okfuskee County, Oklahoma, is not an appealable order nor is said order reviewable by mandamus and said application for mandamus should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 411.—October Term, 1945.

The United States of America, *vs.* Judge Eugene Rice, District Judge for the Eastern District of Oklahoma.	On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

[April 22, 1946.]

Mr. Chief Justice Stone delivered the opinion of the Court.

In this case the Court of Appeals for the Tenth Circuit, acting under § 239 of the Judicial Code, 28 U. S. C. § 346, has certified a question of law upon which it desires the instruction of this Court for the proper decision of the cause. The question is whether that court may, by mandamus, review the judgment of the District Court for Eastern Oklahoma ordering the remand of a proceeding to the County Court of Okfuskee County, Oklahoma, from which it had been previously removed to the district court pursuant to § 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239.

The certificate shows that proceedings were begun in the county court by a petition for administration on the estate of Peter Micco, a restricted Indian member of the Five Civilized Tribes in Oklahoma. The county court granted the petition, and appointed administrators. Section 3 of the Act of April 12, 1926, provides that a party to a suit "in the state courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, . . . and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes." The United States is afforded a specified time after notice is given to appear in the suit, and after such appearance, or the expiration of the time specified, it is provided that "the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though

no Indian land or question were involved." The Act further provides that

> "the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit. . . . It shall then be the duty of the State court to accept such petition and proceed no further in said suit. . . . The said copy shall be entered in the district court of the United States . . . and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court."

Following the service upon the Superintendent of the Five Civilized Tribes of notice of the pendency of the suit in the county court, the United States timely filed its petition in that court for an order of removal, alleging that the proceeding was instituted to obtain the appointment of an administrator for the estate of a three-fourths blood Seminole Indian; that a portion of said estate, comprising real and personal property is restricted under the laws of the United States; that title to and interests in restricted land are involved; that the heirs at law of Micco are restricted Indians and wards of the United States.

Thereupon the county court made its order of removal, and a transcript of the proceedings was filed in the district court. The United States then filed its complaint in intervention in the district court, praying a determination of the heirs of Peter Micco, and of the specific parts of decedent's property which are restricted and subject to the supervision of the Secretary of the Interior. On motion of the administrators appointed by the county court, the district court entered an order dismissing the complaint in intervention without prejudice, and remanding the proceeding to the county court for want of jurisdiction in the district court. *In re Micco's Estate*, 59 F. Supp. 434. The United States thereupon instituted this proceeding in the circuit

court of appeals by a petition for writ of mandamus, to direct the district court to vacate its judgment dismissing the Government's petition for intervention and remanding the proceeding.

The certificate of the circuit court of appeals, after stating that the court is equally divided on two questions, first, whether the judgment of remand is reviewable by mandamus, and, second, whether the proceeding was removable under the provisions of the Act of 1926, certified a single question for our consideration, as follows: "May this court, by mandamus, review the judgment of the United States district court for the eastern district of Oklahoma, ordering the remand of the proceeding to the county court of Okfuskee County, Oklahoma?" The certificate further requested this Court to exercise is authority under § 239 of the Judicial Code, "to require the entire record in the cause to be sent up for its consideration and to decide the whole matter in controversy." The Government has made a motion to like effect.

In considering these requests, it is to be noted that the only matter pending in the court below to which the certified question relates is the application filed in that court for mandamus, on which the court has not acted. There is consequently no order or judgment in the case which can be brought before this Court by appeal. The practice established by statute, 28 U. S. C. § 436, of answering questions certified to this court, or in some such cases, of deciding the entire controversy on the whole record, is plainly not within our original jurisdiction. As far as it is within our appellate jurisdiction, our authority is defined wholly by the statute, which provides that upon the presentation of the certificate, this Court "may require that the entire record in the cause be sent up for its consideration and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought [here] by writ of error or appeal." But the only manner in which we, as an appellate court, can decide a controversy brought here by writ of error or appeal is by affirming, reversing or modifying the order or judgment before us for review. It may be doubted whether the statute contemplates our going beyond the certified question, to decide a case or controversy not within our original jurisdiction, and which, since no inferior court has decided it, could not be brought here on appeal. But we need not resolve the doubt as to our power here, for as will presently appear, the answer which we give to the

question certified is dispositive of the whole case before the Circuit Court of Appeals, making it unnecessary to express an opinion on any other issue which the record might present, or to order the record to be filed here.

The Act of 1926, under which the cause, *In re Micco's Estate*, was removed from the Oklahoma county court, contains no provisions respecting remand or any mode of review of an order of remand. But its provisions must be read with those provisions governing removal of suits from state courts to federal district courts, and their remand, appearing in § 2 of the Judiciary Act of March 3, 1887 (24 Stat. 552, reenacted to correct errors in enrollment, August 13, 1888, 25 Stat. 433, and again reenacted and amended March 3, 1911, 36 Stat. 1094, as § 28 of the Judicial Code, 28 U. S. C. § 71), and in § 37 of the Judicial Code, 28 U. S. C. § 80. Section 80 authorizes remand of "any suit" removed from a state court to a district court where the latter finds that it is without jurisdiction. Section 2 of the Act of 1887, provided for the removal of diversity suits from state courts to federal circuit courts, now district courts, and, as corrected in 1888, contained a separate paragraph, in terms relating to "any cause" removed from a state court into a circuit court. This paragraph read:

> "Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from when it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

Before the Judiciary Act of March 3, 1875, 18 Stat. 470, 472, an order of remand was deemed to be not reviewable by appeal or writ of error because the order was not final. *Railroad Company* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Company*, 137 U. S. 451. But § 5 of the Act of 1875 expressly authorized the review of an order of remand by appeal or writ of error "in any suit" removed from a state court. This provision was repealed by § 6 of the Act of 1887, *supra*, and to make doubly certain, § 2, *supra*, specifically prohibited appeals, with the added direction that the order of remand should "be immediately carried into execution." It thus appears that when the Act of 1926 was passed, the prac-

tice in removal cases was, as it had been established from the beginning, save for a brief interval under § 5 of the Act of 1875, that an order of remand was not appealable, and it is also clear that in 1926, as for forty years before, § 2 of the Act of 1887 required the remand of "any" removed cause to "be immediately carried into execution".

The enactment of § 3 of the 1926 Act, without more, did not confer upon the Government any right of appeal from an order remanding a cause removed under that Act. We cannot say that under the Act of 1926, standing alone, the right of appeal from an order of remand stands on any different footing than it did under any other statute authorizing removal before the enactment of the 1875 Act, or that the order of remand is any less final in the case of the Government than in the case of an individual. Each loses, by the order, such right as there may be to litigate the case in the federal courts on removal, but both retain such rights as they may have to continue the litigation in the state court or to bring an independent suit in the federal courts. To whatever extent the Government may be excluded from the operation of a statute in which it is not named, cf. *United States* v. *Stevenson*, 215 U. S. 190, 197 with *United States* v. *California*, 297 U. S. 175, 186, it is clear that the United States can not assert, by virtue of its sovereignty, a right of appeal which no statute has conferred, or which, if conferred, has been abolished. Not only was no such right of appeal conferred by the Act of 1926, but, we think, as will presently appear, that the provisions of § 2 of the Act of 1887 denying an appeal from an order remanding a case removed under the Act of 1926, denied the right to review by mandamus as well.

Before the enactment of the Act of 1875 it had been suggested that although orders of remand were not appealable, because non-final, they might be reviewed by mandamus. *Railroad Co.* v. *Wiswall*, 23 Wall. 507; see also *In re Pennsylvania Co.*, 137 U. S. 451, 453; *Employers Corp.* v. *Bryant*, 299 U. S. 374, 378. After the right of appeal from such an order was conferred in all removal cases by § 5 of the Act of 1875, the question arose whether there could be review by mandamus of an order denying a motion to remand. This was answered in the negative on the ground that the right to appeal given by the 1875 Act was limited to orders of remand. Hence resort could not be had to mandamus to per-

form the office of a writ of error which Congress had withheld in the case of an order denying remand. *Ex parte Hoard*, 10[illegible] U. S. 578; *Ex parte Harding*, 219 U. S. 364; *Ex parte Roe*, 234 U. S. 70. In all these cases it was pointed out that the mode of review of an order denying remand is by appeal from the final judgment in the suit in which the remand is denied.

But it is urged that the mere failure of the 1926 Act to confer on the Government a right of appeal from an order of remand should not preclude review by mandamus, since, unlike the case where the district court refuses to remand, an order denying the right to have the removed cause tried in the district court could not otherwise be reviewed in the federal courts. But this argument presupposes that the provisions of the 1887 Act, prohibiting appeals from orders of remand, and directing the immediate execution of such order, do not apply to causes removed from the state courts under the Act of 1926, a supposition which disregards the plain purport of the words of the 1887 statute, and its legislative history.

Section 5 of the Judiciary Act of 1875, which, for the first time, authorized review of an order of remand by writ of error or appeal, was, by its terms, made applicable generally to "any suit" removed from a state court to a federal circuit (now district) court. It authorized the circuit court to remand the cause for want of jurisdiction, and provided that the order of remand should be reviewable by appeal. This section was repealed by § 6 of the 1887 Act, and § 2 of that Act substituted for the repealed provision governing appeals, a new provision, which was in terms likewise extended to orders of remand "whenever any cause shall be removed from any State court". Section 6, together with this substituted provision, explicitly withdrew the right of appeal and writ of error in all cases in which it had been previously allowed by Section 5, that is, in all cases removed from state courts under any statute authorizing removal. See *Employers Corp.* v. *Bryant*, *supra*, 380-1.

Section 2 of the Act of 1887 thus expressly denied review by appeal or writ of error from orders of remand which had previously been allowed by § 5 of the Act of 1875 in all cases removed from state courts, but which before that Act had been deemed not to be appealable because not final orders. But § 2 also coupled with this prohibition the direction, made applicable in every case

removed from a state court, that "such remand shall be immediately carried into execution". Reading and construing these provisions together, this Court has consistently held, and it is no longer open to doubt, that an order remanding a cause which is subject to the prohibition against appeals of § 2 cannot be reviewed by mandamus. *In re Pennsylvania Co., supra, Employers Corp.* v. *Bryant, supra.*

Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand. In the former case, Congress has directed that upon the remand the litigation should proceed in the state court from which the cause was removed. It may be arguable, as a matter of policy, that in giving the Government the right to intervene and remove a cause from a state court, it should also have been given the right, not allowed to private litigants, to have orders of remand reviewed in the appellate courts. But the Congressional policy of avoiding interruption of the litigation of the merits of removed causes, properly begun in state courts, is as pertinent to those removed by the United States as by any other suitor, see *United States* v. *California, supra*, 186, and we think it plain that the Act of 1926 did not confer any such right of review, and that the Act of 1887 intended to withhold it in all cases of removal from state courts.

As we have already indicated, and as the legislative history shows, these provisions of the Act of 1887 were intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well. *Cole* v. *Garland*, 107 Fed. 759, dismissed on appeal 183 U. S. 693, approved in *Gay* v. *Ruff*, 292 U. S. 25, 29, n. 5; see also *Employers Corp.* v. *Bryant, supra*, 380-1. It was so held with respect to the Act of 1926 in *United States* v. *Fixico*, 115 F. 2d 389.

Nothing in the Act of 1926 purports to impair or restrict the application of § 2 of the 1887 Act, thus construed, to orders of remand made under 28 U. S. C., § 80, in cases removed under the 1926 Act. Congress, in enacting the 1926 Act, not only

failed to include in it any provision modifying what had been for forty years the established practice of denying review of orders remanding causes removed from state courts, but it must be taken to have been aware of the universality of that practice, and to have been content that, as established by the 1887 Act, it should apply to cases removed under the 1926 Act. Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure. *United States* v. *California*, *supra*, 186.

The certified question will be answered "No", and the Government's motion that we order up the entire record may accordingly be denied.

So ordered.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 411.—October Term, 1945.

The United States of America, *vs.* Judge Eugene Rice, District Judge for the Eastern District of Oklahoma.	On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

[April 22, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Rutledge concur, dissenting.

The Act of April 10, 1926, 44 Stat. 239, has two main purposes. It provides the machinery for bringing in the United States where the property interests of a restricted Indian of the Five Civilized Tribes are being litigated in either the federal or the state courts. This was done so that all interested parties might be concluded by one proceeding and titles to these Indian lands stabilized.[1] H. Rep. No. 222, 69th Cong., 1st Sess., p. 2. In case the proceeding is brought in a state court, the United States is given "the right to remove" the suit to the federal court by filing in the state court a petition for removal. The Act provides that when such petition is filed it shall be "the duty of the State court to accept such petition and proceed no further in said suit." The right to remove is unqualified. It rests in the sole discretion of the United States, which is given the choice of the forum. As stated in the House Report, *supra*, p. 2:

> "Section 3 provides only where the interest of a restricted Indian of the Five Civilized Tribes is being litigated in the State courts that service may be had upon the Government, and the Government is given the right to chose the forum in which the suit may be tried and may transfer such case to the United States district court upon motion in the event that the Government chooses to do so."

[1] Prior to the 1926 Act the United States could not be bound by a proceeding affecting restricted Indian lands. After the matter had been litigated, the United States could still institute an independent suit and annul the prior decree entered in the suit to which it was not a party. Sunderland v. United States, 266 U. S. 226.

But it is said that this special Act, passed in 1926, is governed by the general removal Act of March 3, 1887, 24 Stat. 552, Judicial Code § 28, 28 U. S. C. § 71, which disallows appeals from orders remanding causes removed from state courts. I do not agree.

(1) The 1926 Act contains none of the qualifications written into the general removal acts.

(2) The 1926 Act is an independent statute dealing with a highly specialized problem and limited as to parties and subject matter. The mischief at which the general removal acts were aimed is not present here. They were concerned with eliminating litigious interruptions of private litigation by prolonged disputes over the jurisdiction of the court to which the cause was removed. But the United States is not in a position of a private litigant. The United States has a special function to perform in these Indian cases. It represents the public interest. *Heckman* v. *United States*, 224 U. S. 413, 437-444. It alone is given the "right to remove". If the cause is remanded, it alone can seek review. It should be remembered that the 1926 Act provides a procedure whereby the United States can be bound by a suit instituted by another. It is fair to infer that when the United States was subjected to that risk, Congress intended that it should have a right, if it so elected, to have the cause heard and determined by its own courts. The "right to chose the forum in which the suit may be tried" (H. Rep., *supra*) can hardly have any other meaning.

(3) The 1887 Act in its operation was not applicable to the United States. It provided for removal by defendants. They alone could remove. The right of removal was therefore not available to the United States. It could not be a defendant in a state court, since it had not consented to be sued there. That was well settled at the time. For in 1896 the Court stated, "The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case." *Stanley* v. *Schwalby*, 162 U. S. 255, 270. It seems clear then that the prohibition against review of orders of remand contained in the 1887 Act was not aimed at the United States. I think, therefore, that it should require an explicit provision in the 1926

Act to conclude that the United States was now to be bound by an Act heretofore inapplicable to it. It has long been held that if the United States is to be deprived of a right or a remedy by the general terms of a statute, "the language must be clear and specific to that effect." *United States* v. *Stevenson*, 215 U. S. 190, 197; *United States* v. *American Bell Tel. Co.*, 159 U. S. 548, 554; *United States* v. *Herron*, 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239. This seems to me to be a clear case for the application of that rule.

If Congress had said that orders of remand under the 1926 Act should not be reviewed, mandamus of course would not lie. But since there is no such prohibition, mandamus is available to compel the District Court to perform its duty. *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Co.*, 137 U. S. 451, 453.